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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VINCE BITETTO et al.,	
Plaintiffs and Respondents,	G039890
v.	(Super. Ct. No. 05CC01409)
RAYMOND FELIX et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. Affirmed.

Steven E. Ernest; Herrick Nikas and Richard J. Nikas, for Defendants and Appellants.

Theodore A. Anderson for Defendants and Appellants.

Raymond and Priscilla Felix appeal from a judgment confirming an arbitration award issued against them. The award required the partition and sale of a boat which the Felixes co-owned with another couple, Vince and Debbie Bitteto, and also required that the Felixes pay in excess of $50,000 in attorney fees and costs to the Bittetos.

The Felixes argue the judgment must be reversed because the boat ownership agreement they entered into with the Bittetos was "illegal," and thus the arbitration provision contained therein should not have been enforced. The Felixes also assert the arbitrator exceeded his powers in ordering partition and sale of the parties' interests in the boat, because their agreement specified that the boat's mortgagee must consent to any such sale, and no such consent was obtained. And finally, the Felixes argue the court erred in allowing an award of attorney fees against them. We find none of these assertions persuasive and thus affirm the judgment.

The Felixes' "illegality" argument was not raised at any point during the arbitration or trial court proceedings and is thus waived.[1] But even if we were to consider it, we would note the Felixes' argument suggests only that the *boat mortgage*

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[1] In light of our waiver determination, we deny the Felixes' motion to augment the record to include the mortgage document as part of the record on appeal. The Felixes made no attempt to rely upon this evidence before either the arbitrator or the trial court, and they do not even *suggest* there was any justification for their failure to assert the argument prior to this appeal.

Although the appellate courts have some discretion to accept new evidence, "the rule does not contemplate the reviewing court should take original evidence to reverse a judgment (*First Nat. Bank v. Terry* (1930) 103 Cal.App. 501, 509) and is not available where there is no good cause shown for the unavailability of the evidence below." (*DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 863, fn.3.)

In this case, our consideration of the mortgage document would be further complicated by the rather mysterious circumstances under which it was included in the Felixes' motion to augment. In that motion, the mortgage document was simply identified as "exhibit 1" to the Bitettos' arbitration brief – however, as the Bitettos quickly pointed out, it was the *co-ownership agreement*, not the mortgage document, which had been the exhibit to their arbitration brief. The mortgage document itself was actually never made a part of the record below. In reply, the Felixes do not dispute the Bittetos' assertions about the record, but merely claim they are "at a loss" to explain how the mortgage agreement ended up as the exhibit to *their copy* of the Bitetto's arbitration brief. They deny any "intentional wrongdoing."

We will commend the Bitettos for their sharp eyes, and leave it at that.

itself, which was entered into by them alone, was illegal; it does not actually implicate the co-ownership agreement at issue herein.

The Felixes' contention regarding the arbitrator's power to order the sale of the boat without consent of its mortgagee is also flawed. As with the illegality argument, we note there is no evidence the issue was raised below, and thus it is likewise waived. But even if we were inclined to address the question on the merits, we would have no choice but to affirm. As the Felixes concede, the boat has already been sold in accordance with the arbitrator's initial ruling, and the proceeds of that sale have been distributed. Presumably, then, the mortgagee – who was the chief beneficiary of those proceeds, actually *did* consent to the sale. In any case, the issue is certainly moot now.

And as for the assertion the court erred in allowing attorney fees, we simply cannot accept the premise that the court was responsible for that ruling. It was the *arbitrator* who ultimately ruled an award of fees was appropriate in accordance with the partition law, and determined the appropriate amount of the award. Such a ruling is subject to only a very limited review. Unless the court determined the arbitrator had exceeded the scope of his powers in reaching that conclusion – and not merely misinterpreted the law – the court had no choice but to confirm it. We see no basis for such a determination, and thus affirm the trial court's order.

Finally, the Bittetos have moved for an order dismissing the appeal, and awarding them sanctions, on the basis of their assertion that the Felixes' arguments were entirely frivolous. In our view, a motion to dismiss an appeal based upon the weakness of the arguments posited serves little purpose, as the motion itself *requires* the court to address the appeal on the merits. The motion for dismissal is denied.

The sanctions question, however, is a close one. Although the Felixes' attempt to raise entirely new contentions – both factual and legal – for the first time on appeal does smack of frivolousness, we are disinclined to view those contentions as distinct issues in this case. Because the boat has already been sold, it would be difficult

to conclude the Felixes had anything of significance to gain in suddenly arguing about the rights of the boat's mortgagee (and its alleged affect on the enforceability of the parties' co-ownership agreement) – other than an alternative means of attacking the rather substantial attorney fee award entered against them below. It thus appears this appeal is, as a practical matter, solely about that fee award. And when viewed as a whole, the attack on that fee award was not frivolous.

FACTS

The parties entered into their agreement to co-own the boat in July of 2004. The agreement recites that "[a]s a result of failing to qualify for financing for the Vessel in both Felix and Bitetto's names, title to the Vessel is will be [*sic*] held in the name of Felix. Felix and Bitetto anticipate that title shall stay in the name of Felix indefinitely. If, however, the mortgage on the vessel is paid off, then Felix shall, execute [United States Coast Guard] a bill of sale that transfers one half (1/2) of Felix's interest in the Vessel to Bitetto."

The agreement also contains a provision requiring that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgement [*sic*] upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

A dispute did arise, and in October of 2005, the Bitettos filed a petition to compel arbitration of that dispute. The Felixes later moved to strike the arbitration petition, arguing that state courts had no jurisdiction over "disputes related to United Coast Guard documented vessels [which lies] exclusively with the Federal District Courts sitting in admiralty."

The court denied the motion, and the parties proceeded to arbitration. The arbitrator decided the parties' initial dispute, finding in favor of the Bitettos, and ordering the boat to be partitioned and sold. At that time, the arbitrator "reserved the question of

fees and costs to the trial court." In a subsequent "order after hearing," the arbitrator expressly "reserved the question of all monetary rights and obligation[s] pursuant to the Final Award including fees and costs for a post-sale reconciliation and accounting."

Thereafter, the Bitettos filed a petition with the court requesting an order of attorney fees and costs. The court, in turn, issued an order directing the arbitrator to resolve that issue along with any "remaining disputes" in the case. The arbitrator then found the Bitettos were entitled to recover fees and costs "pursuant to their Partition Action and under the common benefit theory," and ultimately awarded them a total of $52,078.91, representing those fees and costs.

The court subsequently confirmed that award and issued a judgment based thereon.

I

The Felixes first argue the agreement entered into with the Bitettos was illegal and immoral, because it violated the terms of a mortgage entered into for the purchase of the boat – which mortgage allegedly contained a representation that the Felixes lawfully owned "all right, title and interest" in the vessel – and ran afoul of the federal law requiring that a mortgagor of a boat must disclose to the mortgagee all "obligations" on the vessel. (46 U.S.C. § 31330.)

According to the Felixes, that "illegality" means the entire co-ownership agreement, including its arbitration clause, was void *ab initio*, and as a consequence, the arbitrator's award must be vacated. We conclude the issue, which was not raised below, and is based upon the content of a mortgage agreement which the Felixes made no attempt to rely upon below, is waived. "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' '[W]e ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. . . .'" (*Newton v. Clemons*

(2003) 110 Cal.App.4th 1, 11; *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1236.)

The only exception to this rule applies when the new issue "raises a pure question of law;" in such cases the appellate court has discretion to consider the matter. (*Gilliland v. Medical Board* (2001) 89 Cal.App.4th 208, 219.) As explained in *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879, "an appellate court may allow an appellant to assert a new theory of the case on appeal where *the facts were clearly put at issue at trial and are undisputed on appeal.* (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) However, 'if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. [Citations.]' (*Ibid*.)" (Italics added.)

In this case, the new issue sought to be raised by the Felixes is not a pure question of law; if it were, the Felixes would not also be requesting us to consider the content of the alleged mortgage agreement – a document which was not introduced into the proceedings below, but which is now the key *evidentiary* support for the belated assertion. Even assuming the existence and authenticity of that document were not in dispute, the Bitettos' knowledge of its terms apparently is. They explicitly deny any knowledge of the ownership representations made by the Felixes in obtaining the mortgage – the very representations which the Felixes are now claiming render the co-ownership agreement "illegal."

Consequently, this situation falls squarely into the category decried in *Richmond, supra,* 196 Cal.App.3d 869, a factual situation open to controversy and not put into issue or presented below. We reject the request that we address it for the first time on appeal.

But even if we were inclined to address the issue, and assumed the truth of the facts now asserted by the Felixes, we would still conclude the point has no merit.

Even if the Felixes had entered into a mortgage for the boat without disclosing their co-ownership agreement with the Bitettos, and the Bitettos had known of the mortgage terms, those facts would still not render *the ownership contract* illegal.

According to its terms, the co-ownership agreement appears to have been entered into *before* the mortgage; its terms expressly require that the Felixes "will" enter into such a mortgage, thus clearly implying that the mortgage agreement *followed* the execution of the co-ownership agreement. As there is nothing inherently illegal or wrongful about agreeing to co-own a boat, even one the parties anticipate will be the subject of a mortgage, there is simply no basis to conclude there was anything problematic about the co-ownership agreement at the time it was made. And the fact that one of the co-owners may have subsequently made misrepresentations to the mortgagee *about* that co-ownership agreement does not, retroactively, transform that legal contract into an illegal one.

But more important, it is the *mortgage agreement* itself, rather than the co-ownership agreement, which is regulated by 46 United States Code section 31330; it is thus the *mortgage agreement* which was arguably violative of that law. According to their own argument, it was the Felixes *alone* who took out the mortgage – on a boat they knew was the subject of a co-ownership agreement with the Bitettos – and in contravention of federal law, misrepresented its ownership status to the mortgagee. While *that conduct* certainly may be illegal, co-owning a boat with knowledge of its mortgage is not. Consequently, were we to reach it, we would reject the Felixes' argument that the co-ownership contract was itself "illegal," and should not have been enforced.

II

The Felixes' next contention is that the arbitrator exceeded his power in ordering the sale of the boat without consent of its mortgagee. They assert that because the co-ownership agreement expressly provides that any sale of the boat "is subject to the

lender agreeing to the sale," the arbitrator simply had no authority to order a sale in the absence of the mortgagee's consent, and the court should have refused to confirm the award on that basis. (See Code Civ. Proc., § 1286.2, subd. (a)(4).)

The argument is not persuasive. Here again, there is no evidence the issue was raised before either the arbitrator or the court below. Under these circumstances, we have no problem concluding the issue was waived. Indeed, waiver is particularly appropriate where, as here, it seems clear that had the issue been raised below, the mortgagee's consent could have been easily obtained. In fact, as the Felixes themselves acknowledge in their opening brief, the boat has *already been sold* pursuant to the arbitrator's decision, and the mortgagee was paid off in full out of the sale proceeds – leaving approximately $500 in excess to be divided between the parties. That sale could not have occurred without the mortgagee's agreement to release its security interest. Even assuming the boat's mortgagee did not consent in advance to the sale, its acceptance of the proceeds would certainly qualify as a ratification of that sale.[2]

But even if we were to ignore the boat's sale, and the mortgagee's acceptance of the proceeds, we would still have no choice but to affirm. As the record below is entirely silent on the issue of whether the mortgagee expressly consented, it not only contains no evidence that the mortgagee did so, but also no evidence suggesting the mortgagee *did not.* As explained in *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951, "the reviewing court starts with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's affirmative burden to demonstrate otherwise." (Citing *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Absent any record of what evidence may have been adduced before the arbitrator on the issue of the mortgagee's consent, the

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[2] The sale of the boat, and the distribution of the proceeds from that sale, also serve to demonstrate the issue of the mortgagee's consent is moot – it's simply too late to fix the purported problem at this juncture. "A case is moot when the reviewing court 'can have no practical impact or provide the parties effectual relief.' [Citation.]" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.)

Felixes have clearly failed to sustain their burden of demonstrating the arbitrator's decision would have exceeded his powers.

III

The Felixes' final argument addresses the attorney fee issue directly. In essence, they assert two things: 1) the arbitrator somehow lacked arbitral authority to issue any award of fees and costs, and ultimately did so only as an adjunct of the court itself; and 2) the arbitrator's decision to award fees based upon a "common benefit" theory pertaining to the partition claim was an abuse of discretion.

With respect to the first issue, the Felixes suggest the arbitrator was essentially acting in the capacity of a court referee (see Code Civ. Proc., §§ 637 & 638) when he ultimately issued the award of fees and costs in connection with the partition order. They base their assertion on the fact the arbitrator initially *declined* to rule on the issue, and instead referred the matter to the court to make a decision in conjunction with an anticipated proceeding to "enforce" the arbitrator's partition decision. It was only after the court referred the matter *back* to the arbitrator that he actually issued the disputed fee award. According to the Felixes, "[t]he Arbitrator conceded that his powers of referee [*sic*] to supervise the Vessel sale, distribute such proceeds as remained, and award costs and fees *were derived not from the Agreement, but rather from the authority granted him by the court*." (Italics added.)

We disagree with the assertion for two reasons. First, the arbitration provision at issue herein makes it clear that the arbitrator's authority is quite broad, encompassing "[a]ny "controversy or claim *arising out of or relating to*" the co-ownership agreement. (Italics added.) In the arbitration, the Bitettos sought and obtained an order providing for the partition and sale of the co-owned boat. Whether they were entitled to an award of attorney fees arising out of their pursuit of that partition claim is certainly a related issue, and consequently one which also arises out of and relates to the

co-ownership agreement. The arbitrator not only had the right, but the responsibility, to address that issue when raised.

Moreover, we believe the record also establishes that the arbitrator himself understood he had that power. In his initial decision relating to the fee question, the arbitrator explained his belief that the fee request made by the Bitettos had been "reasonable" and stated he would have granted it at that time if such an award had been specifically "authorized by the [co-ownership agreement.]" But there was no fee provision in the agreement itself, leaving the partition law as the only potential avenue for a fee award in the case. The arbitrator went on to explain that because he believed he had no power to actually *enforce* his partition and sale order, the matter would have to be returned to the trial court for an additional "enforcement" proceeding. The arbitrator specifically anticipated there would be "much water that will flow under the bridge between here and there," and thus concluded that the final decision regarding attorney fees and costs to be awarded in connection with the partition order should be "reserved to the Superior Court "*for efficiency purposes*."

There is nothing in the arbitrator's decision to suggest he believed he lacked the authority to adjudicate the fee issue – only that he believed he lacked the direct power to force the partition and sale of the boat, and believed it would be *more efficient* to allow the court to make a decision about the fees in connection with its own enforcement efforts.

Clearly, the court did not share the arbitrator's view of efficiency, because when the Bitettos subsequently filed an application with the court for an adjudication of their claim for fees arising out of the partition, the court promptly bounced the matter right back to the arbitrator. And the arbitrator then decided the issue – in his capacity as the contractually authorized binding arbitrator.

And because the arbitrator decided the fee issue in that capacity, we have very limited authority to reverse the ruling. "Courts may not review the merits of the

[arbitrated] controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning." (*Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200, citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.)

Here, what the Felixes are asking us to do falls squarely within that prohibited territory. They urge us to conclude that the arbitrator "abused his discretion" under the partition law by engaging in an equitable apportionment in the circumstances of this case, citing *Finney v. Gomez* (2003) 111 Cal.App.4th 527. We cannot. An arbitrator's exercise of discretion is part of his reasoning process, and cannot serve as the basis for reversing his award.

As explained in *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at pp. 10-11, "'[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.'" (Quoting *Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 523.) Having chosen arbitration over a court proceeding, the Felixes must accept its result, since "[t]he arbitrator's decision should be the end, not the beginning, of the dispute." (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 10.)

The arbitrator in this case was given broad authority to decide all issues "arising out of or relating to" the co-ownership agreement, and he consequently had the power to adjudicate the availability of attorney fees in conjunction with a partition claim. Once he did so, that decision was subject to challenge only on the very narrow grounds set forth in Code of Civil Procedure section 1286.2. As the Felixes have offered no plausible justification for vacating the decision on any of those grounds, it must be confirmed.

IV

The Bitettos have moved for an award of sanctions, arguing this appeal was frivolous. As set forth in the seminal case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, "an appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit." Moreover, the Supreme Court in *Flaherty* also emphasized that "any definition [of frivolous] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals." (*Ibid*.)

In this case, while we might characterize the Felixes' chances of success in this appeal as "extremely unlikely," we cannot say the appeal is so clearly lacking in merit that "any reasonable attorney" would recognize it as such. As we have already acknowledged, the circumstances leading up to the fee award were arguably a bit confusing. The arbitrator initially suggested the fee decision should be made by the court – in conjunction with an anticipated proceeding to "enforce" the arbitrator's partition decision – and the court subsequently ordered the matter right back to the arbitrator.

If, as the Felixes seem to be arguing, the court's decision to send the matter *back* to the arbitrator were construed as a "reference" order under either Code of Civil Procedure sections 638 or 639, then it would be the court, rather than the arbitrator, which would be viewed as the decision-maker, and our power to review that decision would have consequently been much broader. (Code Civ. Proc., § 644.) And had we the power to consider the Felixes' attack on the fee award under that broader appellate standard, we might very well have considered it one worth making.

So while we have rejected the Felixes' interpretation of the events leading up to the fee decision, and concluded that the more restrictive rules applicable to our review of arbitration awards are applicable here, we cannot say the effort was a "frivolous" one. Consequently, the motion for sanctions on appeal is denied.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.